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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 150

GEORGE HYAM, LINFORD C. SCHMOYER, JOHN SHUTE, JR., LAWRENCE I. YERK, CHARLES B. WEYAND, PAUL L. OSTERBERG, BERNARD M. MEILE, W. A. STOTTLEMIRE, CARL WEVLR, MAZIE GERY, HARVEY S. HOLT, AND JAMES A. HILDEBRANT, *Appellants*,

v.

UPPER MONTGOMERY JOINT AUTHORITY, BOROUGH OF EAST GREENVILLE, BOROUGH OF PENNSBURG, AND BOROUGH OF RED HILL, *Appellees*.

On Appeal From the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appellees have contended by a Motion to Dismiss, that Appellants failed to raise the Federal Questions in this case at the earliest opportunity.[1] (Motion, p. 10, et seq.) Before reaching this erroneous conten-

[1] The other points raised in Appellees' Motion are amply covered in Appellants' Jurisdictional Statement.

tion, Appellants call this Court's attention to the unusual legal path this case has followed.

The action was initiated by Appellants with a Complaint in Equity in the Court of Common Pleas of Montgomery County. That Court never tried the action. In the Complaint, Appellants raised no Federal Question because it was fully expected that a hearing would be afforded in that Court on the merits. Then Appellees petitioned the Supreme Court of Pennsylvania to take original jurisdiction. In their Answer to that Petition Appellants clearly, and unequivocally prayed that Court to remand to Common Pleas "for hearing on the same in due course to the end that the plaintiffs may receive justice and equity in a full hearing of all the facts and circumstances of the cases" (Ans. p. 9) True, no Constitutional citation was made, but the right asserted unmistakeably is founded in that document. No fine technicality of language can erase from that Answer the clear demand for a Constitutional right.

However, it is not necessary to find that this Federal Question was raised in the Answer. Until the Supreme Court of Pennsylvania denied the hearing to Appellants, the latter had no reason to raise the question.

No right to a hearing was denied until then, so that asserting violations of the Federal Constitution in the Petition for Reargument was timely.

A brief review of this case will show the error of Appellees' contention.

The proposed sewer system of Appellees would burden the 4800 residents of these three suburbs with a cost of over $2,500,000, and levy upon each property

owner an assessment of $1,000., with an annual charge of $69.40. Appellants retained, at their own expense, a firm of well-known consulting engineers to study the plan. These engineers reported that the sewer system was incompetently conceived, inadequate to meet the community needs, and should actually cost between one and one-and-a-half million dollars less than Appellees planned to spend.

Moreover, the engineers pointed out that of the 4800 persons to be served by the sewer system, "600 are retired on Social Security or are widows living on pensions," whose average annual income is $3,800. The proposed assessment of $1,000 per family amounts to one-third of their income after taxes.

Since Appellees would not call a hearing at which Appellants' engineers could testify, and the Pennsylvania Act does not provide for a hearing, Appellants filed a suit before the Court of Common Pleas of Pennsylvania to enjoin Appellees from proceeding.

Appellants fully expected on the trial at Common Pleas to call its consulting engineers as witnesses and prove to the Court's satisfaction that it should enjoin the proposed sewer system as ill-conceived and extravagant.

Instead of meeting Appellants on the merits in the trial court, Appellees petitioned to remove the case from the Court of Common Pleas directly into the Supreme Court of Pennsylvania. That petition was granted.

Before the Supreme Court of Pennsylvania Appellants asked that the complaint be remanded to Common

Pleas for a hearing to determine the truth of its allegations. (Brief, Sup. Ct. Pa. p. 7).

Under *Blumenschein v. Pittsburgh Housing Authority*, (1954) 379 Pa. 566, 573, 109 Atlantic 2d 331, Appellants had every reason to believe that the Supreme Court of Pennsylvania would accord them the requested hearing before the Court of Common Pleas. In that case a hearing was had before the Chancellor of the Common Pleas Court concerning the actions of the Housing Authority in certain slum clearance activities. Although the Pennsylvania Supreme Court finally ruled against the appellants there, a full hearing in a case similar to appellants' here—had been accorded the appellants there before the appeal. Therefore, appellants were clearly entitled to assume they also would be afforded a hearing in Common Pleas until the Pennsylvania Supreme Court decided the instant case.

When to Appellants' surprise and dismay, the Supreme Court of Pennsylvania dismissed their complaint *without a hearing*, Appellants filed a Petition for Reargument.

There, Appellants said what they say here:

> "Plaintiffs do not ask this Court to determine which of the allegations of fact are true. What plaintiffs ask is that this Court remand the case for a hearing on the facts so that an injunction may issue against defendants from proceeding with their expensive and insufficient sewer system because of defendants' arbitrary and capricious refusal to consider the findings of plaintiffs' consulting engineers." (p. 4, Petition for Reargument)

Until the Supreme Court of Pennsylvania had denied them a hearing, there was no opportunity for

Appellants to raise the point that that denial was unconstitutional.

Thus, it is that the Petition for Reargument is the first time the Appellants allege that the refusal to give them a hearing deprives them of due process of law and of their privileges and immunities as citizens of the United States under the Fourteenth Amendment to the Constitution of the United States (p. 5, Petition for Reargument).

A citizen cannot contend he has been deprived of a constitutional right before it happens. But certain it is, as soon as it happened, appellants raised the objection in their Petition for Reargument to the Supreme Court of Pennsylvania.

Thus, under the well-settled rule of *Saunders v. Shaw*, (1917) 244 U.S. 317, 37 S.C. 638, 61 L. ed. 1133, the constitutional point was timely raised.

There Mr. Justice Holmes said:

> "When the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, * * * it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." (p. 320)

As if he had our case in mind, Justice Holmes continued:

> "The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance." (p. 320)

As a matter of fact this case is even stronger than *Saunders* v. *Shaw*, because, as we have pointed out before coming here, appellants took the precaution to call to the attention of the Supreme Court of Pennsylvania that their refusal to give appellants a hearing deprived them of a constitutional right.

The two leading texts on Supreme Court Practice agree and point out that under these circumstances, it does not matter that the state Court (as the Supreme Court of Pennsylvania did here) denies the Petition for Reargument without opinion.

> "If the question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question, the petition for rehearing constitutes his first and probably his only chance to present the matter to that court. Accordingly, the federal question is timely raised and will support the exercise of Supreme Court jurisdiction. This is true even if the petition for rehearing is summarily denied without reference to the federal question." (P. 89, Stern and Gressman, 2nd Edition "Supreme Court Practice" 1954, B.N.A. Inc.).

> "The raising of the federal question in a petition for rehearing is timely if it appears that the question was first brought into the case by an unexpected decision of the highest state court, and that the litigants had no opportunity to assert the claimed federal right or immunity." (Wolfson and Kurland's Edition of Robertson and Kirkham on the Jurisdiction of the Supreme Court of the United States, 1951, Matthew Bender and Company.)

None of the cases cited by Appellees are remotely in point except *Brinkerhoff-Faris Trust and Savings Co.*

v. *Hill* (1930) 281 U.S. 673, which is an authority in support of Appellant.[2]

There the Supreme Court of Missouri ruled it could not entertain a bill in equity to enjoin collection of a tax. It said application had to be made to the State Tax Commission. In so doing, it overruled an earlier decision that the State Tax Commission could not entertain this very type of relief. This left plaintiff remediless at the date of the decision, because it was too late for it to file before the State Tax Board. Surprised by the decision, a petition for rehearing was filed asserting the constitutional right to a hearing before being deprived of property.

Appellants are in the same situation. Relying on *Blumenschein* v. *Pittsburgh Housing*, *supra*, we had every right to assume that the Supreme Court of Pennsylvania would remand to Common Pleas for trial.

In granting certiorari and reversing, this Court in Brinkerhoff said:

> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right which the State has no power to destroy, unless there is, or was afforded to him some real opportunity to protect it." (p. 682)

See also: *Missouri* v. *Gehner* (1930) 281 U.S. 313.

The right of Appellees, denied here by the Supreme Court of Pennsylvania, is their right to their day in

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[2] The other case cited by Appellees, *Ohio* v. *Akron Metropolitan Park Dist.*, 281 U.S. 74, that appellants have not timely asserted their Federal rights is an odd choice, inasmuch as this Court in that case assumed that the question was timely raised.

Court, to be heard by the Common Pleas Court of Pennsylvania before they and their property suffers from appellees' extravagant assessment.[3]

As S. A. de Smith, Britain's distinguished Administrative Law Scholar, points out:

> "English law recognizes but two principles of natural justice: that an adjudicator be disinterested and unbiased (*nemo judex in causa sua*) and that the parties be given adequate notice and oppotunity to be heard (*audi alteram partem*)." Judicial Review of Administrative Action (1959) Stevens and Sons and Oceana Publications.

Appellants have never been heard. Appellees' Motion should be denied and the cause remanded for a hearing before the Common Pleas Court of Pennsylvania.

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[3] *Lambert* v. *California*, 355 U.S. 225, *Cheschro* v. *Los Angeles County Flood Control Dist.*, 306 U.S. 459.